Filed 2/27/19 In re Jonathan G. CA1/1

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

In re JONATHAN G., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. JONATHAN G., Defendant and Appellant.	A154139 (San Francisco City & County Super. Ct. No. JW16-6032)

Appellant admitted felony charges of receiving a stolen vehicle and recklessly fleeing a peace officer. Following a disposition hearing, the juvenile court imposed various terms and conditions of probation, one of which appellant challenges on appeal. The condition prohibits appellant from having contact with among others, Joaquin P., and further prohibits him from posting anything on the Internet that he "wants" certain named individuals to view. Appellant also challenges the court's failure to indicate a maximum confinement term and to calculate custody credit. We conclude the provision prohibiting contact with Joaquin P. must be stricken because there is no basis in the record justifying its imposition. We remand for the court to modify its orally pronounced Internet restriction by adopting the tailored and specific language in the clerk's minutes. Additionally, the court is directed to specify the maximum term of confinement and calculate credit for predisposition time spent in custody.

I. FACTUAL AND PROCEDURAL BACKGROUND[1]

On March 3, 2018, the San Mateo Vehicle Theft Task Force observed a stolen white Kia four-door vehicle in the Sears parking lot in the Tanforan Mall in San Bruno. When members of the task force initiated a traffic stop of the vehicle, the driver (appellant) and three other minors attempted to evade arrest. The vehicle sped out of the shopping mall parking lot heading west toward El Camino Real. All lanes of travel were blocked, and the Kia hit the rear passenger side of a green vehicle while attempting to push the vehicle out of the way. The stolen vehicle ran a red light and collided with several other vehicles until it was T-boned by an oncoming vehicle. The Kia then drove into a Shell gas station parking lot and all four suspects fled on foot. After a short foot pursuit, appellant was detained and placed under arrest.

On March 7, 2018, appellant admitted he committed felony receiving a stolen vehicle (Pen. Code, § 496d, subd. (a)) and fleeing a peace officer while driving recklessly (Veh. Code, § 2800.2, subd. (a)).

Prior to this current matter, appellant had been declared a ward of the court on two prior occasions. In 2016, appellant admitted committing misdemeanor assault (Pen. Code, § 245, subd. (a)(4)), and in 2017, he admitted committing felony assault (Pen. Code, 245, subd. (a)(4)).

At the dispositional hearing on the current petition, the juvenile court vacated appellant's prior out-of-home placement, redeclared wardship, and referred him for a new placement. As will be discussed further, the court orally imposed various terms and conditions of probation, including appellant is to have no contact with Joaquin P. and seven other named individuals and is prohibited from posting "anything on the Internet that you want them [(the eight named individuals)] to see."[2]

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[1] Because a contested evidentiary hearing was not held, the underlying facts are taken from the dispositional report.

[2] One of the specified individuals is the victim**.** The others (apart from Joaquin P.) we assume, from our review of the record, were either coparticipants in appellant's latest offenses or he and the others were involved in prior illegal activity.

II. DISCUSSION

A. *No Contact with Joaquin P.*

The juvenile court ordered appellant have no contact with eight named individuals, including Joaquin P. When appellant asked why he had to "stay away from Joaquin," the judge responded, "Because I just ordered you to." Defense counsel subsequently objected to the no-contact order for Joaquin P., arguing Joaquin was "not even included in the probation dispositional report." Replying to defense counsel's objection, the judge explained, "Because I know that he has been involved in trouble with those other individuals. [¶] . . . [¶] . . . So I'm trying to keep Jonathan and, frankly, Joaquin out of any further trouble. So I don't know why this is even an issue. We know Jonathan is having problems because, in part, he is associating with people who are getting him into trouble. I'm trying to keep him out of that trouble, so that's why."

Appellant challenges the restriction prohibiting contact with Joaquin P., urging this court to strike this condition because it is not based on any evidence or valid reason. Appellant claims he "never planned, committed or engaged in any criminal activity with Joaquin."

The Attorney General agrees with appellant that the record fails to provide a basis for a no-contact order for Joaquin P. Rather than strike this no-contact condition, however, the Attorney General suggests we remand for the juvenile court to either reconsider this no-contact condition or state its rationale supporting it. We decline to order remand of this condition because we agree with appellant that the judge's decision was based on some unknown information outside of the record instead of evidence before the court, and whatever the judge knew was insufficient to support the no-contact condition.

When a minor is made a ward of the juvenile court and placed on probation, the court "may impose and require any and all reasonable conditions that it may determine fitting and proper to the end that justice may be done and the reformation and rehabilitation of the ward enhanced." (Welf. & Inst. Code, § 730, subd. (b).) The court has "broad discretion to fashion conditions of probation" (*In re Josh W.* (1997)

55 Cal.App.4th 1, 5), although "every juvenile probation condition must be made to fit the circumstances and the minor" (*In re Binh L.* (1992) 5 Cal.App.4th 194, 203).

Although a juvenile court's discretion to impose probation conditions is broad, it is not unlimited. (*In re D.G.* (2010) 187 Cal.App.4th 47, 52.) The Supreme Court in *People v. Lent* (1975) 15 Cal.3d 481 (*Lent*), superseded on other grounds as stated in *People v. Moran* (2016) 1 Cal.5th 398, 403, footnote 6, set forth three criteria for assessing the validity of a condition of probation: "A condition of probation will not be held invalid unless it '(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality . . . .' " (*Lent*, at p. 486.) All three prongs must be satisfied before a reviewing court will invalidate a probation term. (*People v. Olguin* (2008) 45 Cal.4th 375, 379.)

We review the imposition of a probation condition for an abuse of discretion (*People v. Olguin*, *supra*, 45 Cal.4th at p. 379), taking into account "the sentencing court's stated purpose in imposing it" (*People v. Fritchey* (1992) 2 Cal.App.4th 829, 837).

We see no point here in adopting the Attorney General's suggestion of remanding the condition prohibiting contact with Joaquin P. for the juvenile court to explain its rationale. The juvenile judge failed to identify any document, report, statement, or other relevant and material evidence upon which he relied to determine appellant and Joaquin P. had been in trouble together or Joaquin had been in trouble with the other individuals named in the no-contact condition.[3] Nor have we found any basis in the record for imposing this condition. Instead the judge relied on his supposed personal knowledge, without further explanation, to justify the imposition of this contested condition. Clearly, under *Lent*, on the record before us, preventing appellant from having contact with Joaquin P. has no relationship to appellant's crimes, or to any improper

[3] The judge did not take judicial notice of any documents or files regarding Joaquin P.

conduct, and is not reasonably related to future criminality. Moreover, by relying on unidentified evidence, the judge further deprived appellant of the opportunity to dispute the reliability of the information upon which the judge relied.[4] Because the judge's decision, based on a vague reference to his personal knowledge, was inadequate to support the imposition of the condition prohibiting contact with Joaquin P., there is no basis for remand. We, therefore, conclude the juvenile court abused its discretion, and strike the portion of the no-contact condition prohibiting contact with Joaquin P.

B. ***Prohibiting Internet Communication***

In conjunction with the no-contact condition, the juvenile court ordered appellant could neither contact nor communicate via the Internet with the eight specified individuals: "And just to be clear, when I say stay away and have no contact, I mean no contact. You cannot be in the same place with any of those individuals. You cannot visit them. They cannot visit you. You must not attempt to contact them through the mail, through electronics, through face-to-face contact. *Do not post anything on the Internet that you want them to see. Do not look at anything that they post on the Internet*. Do not text them. Do not call them. Do not receive texts or calls from them." (Italics added.) The minute order, however, deviates from the court's oral pronouncement, particularly with respect to use of the Internet. It states: "That means you are to have no communication or contact whatsoever. You are not to go to their house, they are not to come to your house. You are not to communicate with them in person, by telephone, e-mail, voice mail, pager code, letter or by sending or message [*sic*] through someone else. *In addition, you are not to communicate by any social media site including but not limited to Facebook, MySpace, Instagram, Twitter and SnapChat*. . . ." (Italics added.)

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[4] Welfare and Institutions Code section 706 provides in pertinent part: "After finding that a minor is a person described in Section 601 or 602, the court shall hear evidence on the question of the proper disposition to be made of the minor. The court shall receive in evidence the social study of the minor made by the probation officer and any other relevant and material evidence that may be offered, including any written or oral statement . . . ."

"Conflicts between the reporter's and clerk's transcripts are generally presumed to be clerical in nature and are resolved in favor of the reporter's transcript unless the particular circumstance dictates otherwise." (*In re Merrick V.* (2004) 122 Cal.App.4th 235, 249.) If " 'an irreconcilable conflict exists between the transcripts of the court reporter and the court clerk, the modern rule is not automatic deference to the reporter's transcript but rather adoption of the transcript due more credence under all the surrounding circumstances.' " (*In re Malik J.* (2015) 240 Cal.App.4th 896, 905.)

The court's oral pronouncement ordered appellant not to post anything on the Internet he wanted the eight individuals to see, while the clerk's minute order prohibited appellant from communicating with the eight individuals via social media accounts, giving specific examples of social media. The conflict between the court's broader, more ambiguous explanation of the condition and the more specific prohibition on conduct in the clerk's minute order requires appellant to guess what conduct is prohibited. Because the court's oral pronouncement apparently expands the scope of the condition, we resolve this conflict in favor of the reporter's transcript and review the constitutionality of the oral pronouncement. (See, e.g., *In re Merrick V., supra*, 122 Cal.App.4th at p. 249.)

C. *Whether the Internet Condition is Vague and Overbroad*

Appellant claims the probation condition prohibiting him from posting anything on the Internet he wants the named individuals to see is unconstitutionally vague and overbroad "because it fails to provide proper notice of what [appellant] may post online, provides undue discretion to the probation department to subjectively enforce the condition, and prohibits behavior that is not narrowly tailored to the state's interest in deterring criminal behavior."

We review the constitutionality of a probation condition de novo. (*In re Malik J., supra*, 240 Cal.App.4th at p. 901.)

1. Vagueness

We first address appellant's argument this probation condition is unconstitutionally vague. Appellant emphasizes the issue is not whether the terms

"Internet" and "post" are vague. Rather he challenges as vague the phrase "that you want them to see."[5]

"[T]he underpinning of a vagueness challenge is the due process concept of 'fair warning.' [Citation.] The rule of fair warning consists of 'the due process concepts of preventing arbitrary law enforcement and providing adequate notice to potential offenders' [citation], protections that are 'embodied in the due process clauses of the federal and California Constitutions.' " (*Sheena K., supra,* 40 Cal.4th at p. 890.) Our examination of the challenged condition is "guided by the principles that 'abstract legal commands must be applied in a specific *context*,' and that, although not admitting of 'mathematical certainty,' the language used must have ' " *reasonable* specificity." ' " (*Ibid.*) In sum, the probation condition must be " 'sufficiently precise for the probationer to know what is required of him [or her], and for the court to determine whether the condition has been violated.' " (*Ibid.*) A probation condition is sufficiently specific " ' "if any reasonable and practical construction can be given its language or if its terms may be made reasonably certain by reference to other definable sources." ' " (*People v. Lopez* (1998) 66 Cal.App.4th 615, 630 (*Lopez*).)

In the instant matter, prohibiting appellant from posting anything on the Internet that he "want[s]" the named individuals to see suffers from vagueness because it authorizes a probation officer to subjectively determine what appellant "wants," and to speculate as to appellant's intent. Moreover, we fail to grasp how a court can determine whether this condition has been violated—in other words, whether appellant wanted the named individuals to see his post or whether it was meant for others to view.

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[5] Although appellant also appears to be contesting the condition, "Do not look at anything that they post on the Internet," he has not made any vagueness argument on appeal in support of this challenge. And, in fact, his reply brief states he is "focused on the judge's inclusion of the word 'want' and how no probation officer or court can objectively determine who [appellant] wanted to read his posts." We, therefore, will not consider his objection to this particular term of probation as it relates to vagueness.

Although we conclude the court's oral pronouncement prohibiting appellant from posting anything on the Internet he "want[s]" the specified individuals to see is vague, the clerk's minute order stating appellant cannot "communicate [with them] by any social media site including but not limited to Facebook, MySpace, Instagram, Twitter and SnapChat" is sufficiently direct and specific to overcome any claim of vagueness.

First, the language of the minute order does not implicate appellant's intent or allow his probation officer or the court to speculate as to his intent. Using straightforward and unambiguous language, it orders appellant not to communicate at all with these specified persons via social media. And significantly, this term of the minute order does not preclude appellant from using social media to communicate with anyone else other than those named individuals.

Second, the minute order is sufficiently precise to provide appellant with fair warning of what is required of him and for the court to determine whether the condition has been violated.

As to the use of social media, a practical, acceptable, and commonsense definition of the term "social media" does exist, which is what a probation condition needs to pass constitutional muster. According to the Oxford English Dictionary, "social media" constitutes "websites and applications which enable users to create and share content or to participate in social networking." (Oxford English Dict. Online (2019) <http://www.oed.com> [as of Feb. 27, 2019].) In turn, "social networking" is defined as "the use or establishment of social networks or connections; (now *esp.*) the use of websites which enable users to interact with one another, find and contact people with common interests, etc." (Oxford English Dict. Online (2019) <http://www.oed.com> [as of Feb. 27, 2019].) And "social network" is defined as "a system of social interactions and relationships; a group of people who are socially connected to another; (now also) a social networking website; the users of such a website collectively." (Oxford English Dict. Online (2019) <http://www.oed.com> [as of Feb. 27, 2019].)

We are guided by the general principles that the language used in a probation condition must only have " ' "*reasonable* specificity," ' " not " 'mathematical

certainty.' " (*Sheena K., supra,* 40 Cal.4th at p. 890.) And a probation condition is sufficiently specific " ' "if any reasonable and practical construction can be given its language or if its terms may be made reasonably certain by reference to other definable sources." ' " (*Lopez, supra,* 66 Cal.App.4th at p. 630.)

Here the term "social media" has a reasonably certain definition: Web sites or applications where users can share and generate content and find and connect with other users of common interest. Moreover, the term was made sufficiently specific in the minute order by clarifying social media included "Facebook, MySpace, Instagram, Twitter and SnapChat." Additionally, the condition's purpose—to deter appellant from communicating with the other named persons online—provides the needed clarity.

Other appellate courts have concluded that illustrative examples and the trial court's reason for imposing the probation condition can cure a probation condition's vagueness problem. This is based on the general concept that " 'abstract legal commands must be applied in a specific *context*. A contextual application of otherwise unqualified legal language may supply the clue to a law's meaning, giving facially standardless language a constitutionality.' " (*Lopez, supra,* 66 Cal.App.4th at p. 630.)

For example, in *In re Malik J., supra,* 240 Cal.App.4th 896, the appellate court considered whether a probation condition requiring the minor to " 'provide all passwords to any electronic devices, including cell phones, computers or [notepads], within [the minor's] custody or control' " was unconstitutionally vague and overbroad. (*Id.* at p. 900.) The appellate court concluded the imposed search condition was meant to encompass "similar electronic devices within [the minor's] custody and control that might be stolen property, and not, as [the minor] conjectures, to authorize a search of his Kindle to see what books he is reading or require him to turn over his ATM password." (*Id.* at p. 905.) Like in *Malik,* the minute order here provided context by listing certain examples of social media covered by the probation condition, i.e., Facebook, MySpace, Instagram, Twitter, and SnapChat.

For the foregoing reasons, we determine that while the oral pronouncement—"Do not post anything on the Internet that you want them to see"—is vague, adoption of the

language in the minute order condition prohibiting appellant from using social media (with examples) to communicate with the named individuals would cure the unconstitutionality.

2. Overbreadth

We next turn to appellant's assertion that the juvenile court's pronouncement restricting appellant from personally communicating with the victim and the other named persons and prohibiting him from looking at anything the others post on the Internet is constitutionally overbroad. According to appellant, the condition is overbroad because it is "not narrowly tailored to the government's interest in public safety" thereby impinging on his right to free speech. Appellant maintains "[f]or millennials" such as he, "the online social media message board is not just a public space for expression but *the* public space to express and receive views about politics, economics, art, science and society," and he "would lose access to the primary public forum upon which he relies for news, politics, employment, current events, personal relationships and a multitude of other necessities of modern life."

We believe neither the contested language of the orally announced no-contact condition nor the preferred direct and specific language contained in the clerk's minutes burdens appellant's First Amendment rights because neither precludes him from continuing his other personal relationships, nor prevents him from accessing news, employment and other necessities of modern life. In short, here, the restriction on the use of the Internet and social media to contact the named persons is reasonably tailored to address appellant's posting conduct and rehabilitation. Additionally, the restriction on the use of the Internet and social media is limited in time and scope because it would only affect appellant while he is on probation and is not an outright social media ban. He would still be able to access many different forums of association and expression.

3. Conclusion

In sum, we conclude the oral pronouncement by the juvenile court—"Do not post anything on the Internet that you want them to see"—is vague. Instead, we instruct the trial court on remand to replace this probation term with the clerk's minute order

language: "You are not to communicate [with the named individuals] by any social media site including but not limited to Facebook, MySpace, Instagram, Twitter and SnapChat."

C. *Failure to Specify the Maximum Term of Confinement*

Appellant asserts and the Attorney General concedes the juvenile court failed to specify the maximum confinement term and to calculate custody credits.[6]

When a minor is removed from his or her parent's or custodian's physical custody because of a criminal violation sustained under Welfare and Institutions Code section 602, the court must specify the maximum term of imprisonment that could be imposed upon an adult convicted of the same offense or offenses. (Welf. & Inst. Code, § 726, subd. (d)(1); Cal. Rules of Court, rule 5.795(b); *In re Matthew A.* (2008) 165 Cal.App.4th 537, 541.) Additionally, the court is required to calculate credit for predisposition time spent in custody and subtract the credit from the maximum confinement calculation. (*In re J.M.* (2009) 170 Cal.App.4th 1253, 1256; *In re Lorenzo L.* (2008) 163 Cal.App.4th 1076, 1079.)

Accordingly, on remand the juvenile court shall state the maximum term and calculate custody credits.

III. DISPOSTION

The matter is remanded with instructions that the juvenile court delete, from the no-contact probation condition, "You must stay away from and have no contact with . . . Joaquin [P.]" The court shall further delete, "Do not post anything on the Internet that you want them to see," and replace it with, "You are not to communicate by any social media site [with the seven named individuals] including but not limited to Facebook, MySpace, Instagram, Twitter, and SnapChat." The court is further directed to specify the maximum term of confinement and calculate credit for predisposition time spent in custody.

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[6] The March 7, 2018 court minute order reflects the maximum term of confinement is five years eight months.

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Margulies, J.

We concur:

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Humes, P. J.

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Sanchez, J.

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